

RCRA REVISION CHECKLIST 167 D - **REVISED**

Mineral Processing Secondary Materials Exclusion

63 FR 28556-28753

May 26, 1998

(RCRA Cluster VIII, non-HSWA provisions)

NOTE: The rule addressed by this checklist defines the circumstances under which secondary materials generated within the primary mineral processing industry from which minerals, acids, cyanide, water or other values are recovered by mineral processing are excluded from the definition of solid waste. Note, however, that the U.S. D.C. Circuit Court of Appeals vacated the portion of the rule that attempted to regulate as waste certain sludges and by-products exhibiting a characteristic of hazardous waste that are not listed in 40 CFR 261.31 or 261.32. As a result of the court decision and based on the wording of 40 CFR 261.4(a)(16), listed sludges and by-products are never excluded from the definition of solid waste; therefore, only reclaimed spent materials are covered by the conditional exclusion introduced by the rule. This checklist has been revised to reflect these changes. See the summary for this checklist for an explanation of the vacatur and how it impacts authorization of state programs.

FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:			
			EQUIV- ALENT	LESS STRIN- GENT	MOR E STRI N- GENT	BROADE R IN SCOPE

PART 261 - IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

SUBPART A - GENERAL

DEFINITION OF SOLID WASTE

†,1,2 insert “(except as provided under 40 CFR 261.4(a)(15))” at end of first sentence	261.2(c)(3)					
†,1 revise Table 1 by inserting in third column heading “(except as provided in 261.4(a)(15) for mineral processing secondary materials)” following “Reclamation (§ 261.2(c)(3))”	261.2(c)(4)/Table					

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FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:			
			EQUIV- ALENT	LESS STRIN- GENT	MOR E STRI N- GENT	BROADE R IN SCOPE
†,1,3 add sentence; where materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion at 261.4(a)(15) apply	261.2(e)(1)(iii)					

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FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:			
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EXCLUSIONS						
add new paragraph; secondary materials generated within the primary mineral processing industry from which minerals, acids, cyanide, water or other values are recovered, provided that:	261.4(a)(16) intro					
add new subparagraph; secondary material is legitimately recycled to recover minerals, acids, cyanide, water or other values	261.4(a)(16)(i)					
add new subparagraph; secondary material is not accumulated speculatively	261.4(a)(16)(ii)					
add new subparagraph; except as provided in 261.4(a)(15)(iv), the secondary material is stored in tanks, containers, or buildings meeting the specified minimum integrity standards; if tanks or containers contain particulate subject to wind dispersal, owner/operator must operate units in a manner which controls fugitive dust; units must be designed, constructed and operated to prevent significant releases to the environment of these materials	261.4(a)(16)(iii)					

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FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:			
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† add new subparagraph; Regional Administrator or State Director may make a site-specific determination that only solid mineral processing secondary materials may be placed on pads, rather than in tanks, containers, or buildings; solid mineral processing secondary materials do not contain free liquid; pads must be designed, constructed & operated to prevent significant releases and provide same degree of containment afforded by the non-RCRA tanks, containers & buildings eligible for exclusion	261.4(a)(16)(iv)					
† add new subparagraph; environmental considerations for pads	261.4(a)(16)(iv)(A)					
† add new subparagraph; minimum standards for pads	261.4(a)(16)(iv)(B)					
† add new subparagraph; notice and comment opportunity requirements before decision	261.4(a)(16)(iv)(C)					

**RCRA REVISION CHECKLIST 167 D: Mineral Processing Secondary
Materials Exclusion (cont'd)**

FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:			
			EQUIV- ALENT	LESS STRIN- GENT	MOR E STRI N- GENT	BROADE R IN SCOPE
† add new paragraph; owner/operator provides notice to Regional Administrator or State Director identifying specified information; notification must be updated when type of materials recycled or location changes	261.4(a)(16)(v)					
† add new paragraph; for purposes of 261.4(b)(7), mineral processing secondary materials must be the result of mineral processing & may not contain listed hazardous wastes; listed & characteristic hazardous wastes generated by non-mineral processing industries are not eligible for exclusion	261.4(a)(16)(vi)					

¹ Note that there are typographical errors at 261.2(c)(3), 261.2(c)(4) [Table heading], 261.2(e)(1)(iii) and 261.4(a)(16)(iii). All make reference to “261.4(a)(15)”, the Kraft Mill Steam Strippers exclusion, when they should be referring to “261.4(a)(16)” the exclusion for secondary materials generated by the primary mineral processing industry. Note that Revision Checklist 179 (64 FR 25408-25417; May 11, 1999) redesignated the provision as 261.4(a)(17).

² The rule addressed by Revision Checklist 167D included a change that added “(except as provided under 40 CFR 261.4(a)(15))” at the end of the second sentence in 261.2(c)(3). This revision was set aside by the U.S. D.C. Circuit Court of Appeals in Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047 (D.C. Cir. 2000). In that decision, the Court held that the expansion of the definition of solid waste to include materials based on how they are stored prior to reclamation is not appropriate. This checklist was revised to reflect this court decision. A State that chooses to include the parenthetical to the second sentence should indicate that its analog is broader in scope as explained in the summary for this checklist.

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- ³ The preamble to the May 26, 1998 (CL 167D) rule indicates that language is being added to the existing provision at 261.2(e)(1)(iii). The instructions indicate that the paragraph is being revised. It is not EPA's intention to remove the existing language and replace it with the May 26, 1998 provision. EPA intends to issue a technical correction which clarifies this provision. Until that amendment is available, it is recommended that the new sentence be added at the end of the existing provision.